

No. 1-13-0236

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

TASHA McCULLOUGH, Independent Administrator of	)	Appeal from the
the Estate of Tonette McCullough, Deceased,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	No. 09 L 6579
v.	)	
	)	Honorable
JOSEPH VITELLO, M.D.,	)	James M. Varga,
	)	Judge Presiding.
Defendant-Appellee.	)	
	)	

---

JUSTICE MASON delivered the judgment of the court.  
Presiding Justice Hyman and Justice Neville concurred in the judgment.

**ORDER**

- ¶ 1 *HELD:* The trial court did not err in sustaining defendant's objections to plaintiff's expert witness's evidence deposition testimony on the issue of causation where plaintiff never disclosed those opinions and barring such testimony was a proper sanction for plaintiff's failure to comply with Rule 213. Moreover, the trial court correctly entered a directed finding in favor of defendant where plaintiff presented no evidence on the issue of causation.
- ¶ 2 Plaintiff-appellant Tasha McCullough (Tasha) filed a medical malpractice action against defendant-appellee Joseph Vitello, M.D., as independent administrator of the estate of Tonette

McCullough (Tonette), deceased. Tasha alleged that Dr. Vitello negligently failed to diagnose Tonette's peritonitis that developed as a result of her gastric bypass surgery and that Tonette died as a result of Dr. Vitello's negligence. On appeal, Tasha contends that the trial court erred in sustaining defendant's objections to her expert witness's evidence deposition testimony and barring any testimony by the expert witness on the subject of causation as a sanction for failure to disclose such opinions in compliance with Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007). Tasha further contends that the trial court erred in entering a directed finding in favor of Dr. Vitello. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3

#### BACKGROUND

¶ 4 On May 28, 2003, Tonette underwent gastric bypass surgery. Dr. Vitello performed the surgery. Tonette was released from the hospital on May 31 but returned to the emergency room on June 1 with severe back pain and shortness of breath. Tonette died on June 1 of peritonitis, an inflammation of the tissue in the abdominal organs.

¶ 5 Tasha, Tonette's sister and the independent administrator of her estate, filed a medical malpractice claim against Dr. Vitello in 2005. That complaint was voluntarily dismissed on January 22, 2009. The case was refiled on June 4, 2009. The complaint alleged that Dr. Vitello negligently failed to (1) order certain postoperative blood tests; (2) order proper radiographic tests to determine if postoperative leaks were present; (3) closely monitor vital signs to determine if postoperative leaks or other complications were present; and (4) perform a thorough discharge examination. The complaint further alleged that as a result of one or more of these negligent actions, Tonette developed peritonitis, which led to her death.

¶ 6 In her answers to Rule 213 interrogatories, Tasha disclosed that Dr. Aldo Fusaro, the medical examiner who performed the autopsy, would testify as an independent expert witness pursuant to Illinois Supreme Court Rule 213(f)(2) (eff. Jan. 1, 2007). Dr. Fusaro was expected to testify regarding his findings, examination and observations as detailed in his autopsy report, and his testimony would be consistent with his previously given deposition testimony.

¶ 7 Tasha further disclosed that Dr. Victor F. Novak would testify as a controlled expert witness pursuant to Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007). Dr. Novak was expected to testify regarding the opinions expressed in two attached reports, dated May 23, 2005, and August 5, 2010. Both reports indicated that Dr. Novak believed Dr. Vitello deviated from the standard of care in (1) failing to order certain postoperative blood tests, (2) failing to order radiographic tests to determine if postoperative leaks were present, and (3) failing to perform a thorough discharge examination. The 2005 report stated that Dr. Vitello also deviated from the standard of care in failing to closely monitor vital signs postoperatively. The 2010 report stated that Dr. Vitello deviated from the standard of care in failing to ensure adequate oral intake prior to discharge. Neither report contained an opinion on causation. Two medical journal articles were also attached to the interrogatory answers.

¶ 8 At his discovery deposition on January 30, 2012, Dr. Novak testified that the primary risk of the type of gastric bypass surgery performed on Tonette was death. Other risks included wound infections, leaks, strangulations, internal hernia, bleeding, persistent nausea and vomiting, failure to lose weight, pulmonary embolisms and electrolyte disturbances. Dr. Novak confirmed that any of these risks can occur even where the surgeon has not been negligent. According to

1-13-0236

Dr. Novak, the standard of care requires that every patient who undergoes this type of surgery must have a postoperative CBC, chemistry and upper GI test. Dr. Novak's opinion that Dr. Vitello did not perform a thorough discharge exam was based on the lack of physician progress notes in the medical records at least 11 hours prior to discharge. Finally, Dr. Novak explained that Tonette's postoperative oral fluid intake was below the standard of care because the medical records showed she took in approximately 500 ccs per day and the minimum suggested level is 900 ccs.

¶ 9 Dr. Fusaro's evidence deposition was taken on April 2, 2012. Dr. Fusaro performed Tonette's autopsy. Dr. Fusaro observed approximately two liters of gray/green cloudy ascites, a fluid that seeps out of the body's internal organs, in Tonette's body cavity. The gray/green color and cloudiness of the ascites indicated that there was an inflammatory problem. Because it had also been only four days since Tonette's surgery, Dr. Fusaro concluded that Tonette developed an infection as a result of the surgery.

¶ 10 Dr. Fusaro noted that all suture lines appeared non-inflamed and no ulcerations were identified. Blood cultures were also done to determine whether there was bacteria in the blood, and the results indicated the presence of common bowel bacteria. Although the suture lines appeared to be intact, Dr. Fusaro stated that they could have leaked in a microscopic way, allowing bacteria to escape. Based on the amount and characteristics of the ascites, Dr. Fusaro determined that the cause of death was peritonitis, an inflammation of the surfaces of the abdominal organs, as a result of Tonette's gastric bypass surgery. However, on cross-examination, Dr. Fusaro acknowledged that he was not able to determine the source of the

peritonitis to a reasonable degree of medical certainty.

¶ 11 Dr. Novak's testimony at his evidence deposition on April 9, 2012, was consistent with his testimony at his discovery deposition on the areas where he believed Dr. Vitello deviated from the standard of care. However, Dr. Novak testified for the first time that if Dr. Vitello had ordered a CBC, Tonette's white blood cell count would have indicated the presence of infection and Dr. Novak believed her death would have been prevented. Dr. Novak also explained, again for the first time, that an upper GI test was a "fail-safe" method to detect postoperative leaks and if a leak had been detected, the patient's death would have been preventable because the surgeon could have performed a second operation to repair the leak or placed a drain in that area. Dr. Novak further testified that if Dr. Vitello had performed a thorough discharge examination, he would have discovered that Tonette was experiencing classic symptoms of a leak and Tonette would have been kept in the hospital.

¶ 12 On April 10, 2012, the date set for trial, counsel for Dr. Vitello filed objections to Dr. Novak's causation testimony, requesting that such testimony be barred on the grounds that no causation opinions were disclosed as required under Rule 213. Several days of lengthy discussions between the trial court and counsel for both parties followed. The trial court first noted that causation and standard of care are separate elements in a medical negligence case and ruled that opinions given at Dr. Novak's evidence deposition on proximate cause were not logical corollaries to Dr. Novak's disclosed opinions on deviations from the standard of care. The trial court also agreed that Dr. Fusaro's testimony did not provide the necessary link between deviations from standard of care and proximate cause, where Dr. Fusaro merely testified that the

cause of death was peritonitis as a result of the gastric bypass surgery, and peritonitis is a known risk of this surgery even in the absence of negligence.

¶ 13 After reviewing Dr. Novak's discovery deposition with counsel for both parties, the trial court observed that it was not sufficient to merely say that a doctor should have ordered a test, but there must also be testimony that the test would have shown a certain result and the doctor could then have performed a specific procedure that would have prevented the patient's death. The trial court reiterated that Tasha had not disclosed the necessary causal link to establish medical negligence.

¶ 14 The trial court also rejected Tasha's argument that Dr. Novak's opinions on causation were disclosed because the articles he relied on as a basis for his conclusion were attached to the Rule 213 disclosures and defendant's counsel therefore could not have been surprised. The trial court concluded that the articles do not constitute expert opinions and the purpose of Rule 213 is to ensure that the defendant knows before trial the specific opinions that he needs to have his own expert address at trial.

¶ 15 The trial court granted defendant's objections to Dr. Novak's undisclosed causation testimony and all of the testimony on the issue of causation was stricken. In light of the trial court's rulings on the causation testimony, the parties agreed to bifurcate the issues of liability and damages and proceed with a bench trial on the issue of liability. Tasha submitted the evidence depositions of Dr. Fusaro and Dr. Novak and the trial court then granted Dr. Vitello's motion for a directed finding due to Tasha's failure to present a *prima facie* case based on the lack of any evidence on the issue of proximate cause. Tasha's posttrial motion was denied and

she timely filed this appeal.

¶ 16

## ANALYSIS

¶ 17

### A. Causation Testimony

¶ 18 Tasha first contends that the trial court erred in precluding Dr. Novak's testimony on the issue of proximate cause. Evidentiary rulings are within the discretion of the trial court and a reviewing court will not overturn such rulings absent a clear abuse of discretion. *Simmons v. Garces*, 198 Ill. 2d 541, 570 (2002). In making this determination, we may not substitute our judgment for that of the trial court, nor do we determine whether the trial court exercised its discretion wisely. *Id.* at 568. An abuse of discretion is found where "the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009) (quoting *People v. Hall*, 195 Ill. 2d 1, 20 (2000)).

¶ 19 The trial court precluded Dr. Novak's new opinions based on plaintiff's failure to disclose those opinions on proximate cause as required under Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007). Dr. Novak testified as a controlled expert witness pursuant to Rule 213(f)(3), which provides that a party must identify "the conclusions and opinions of the witness and the bases therefor." Ill. S. Ct. R. 213(f)(3)(ii) (eff. Jan. 1, 2007).

¶ 20 In order to sustain a cause of action for negligence, a plaintiff must first establish a standard of care and a deviation from that standard. *Simmons*, 198 Ill. 2d at 556. A plaintiff must then show a causal connection between the deviation and the injury. *Id.* "In a medical malpractice case, proximate cause must be established by expert testimony to a reasonable degree

of medical certainty." *Id.*

¶ 21 Tasha's interrogatory answers regarding Dr. Novak's testimony disclose four opinions regarding deviations from the standard of care. No opinions regarding proximate cause were disclosed. Dr. Novak also did not offer any opinions on the issue of proximate cause at his discovery deposition.

¶ 22 Tasha argues that Dr. Novak's opinions on proximate cause were logical corollaries to his disclosed opinions on standard of care deviations. Tasha acknowledges that Dr. Novak testified at his discovery deposition that an article attached to the interrogatory answers was a basis for his standard of care opinion on upper GI testing, but she contends that the article's discussion of the catastrophic consequences of a failure to diagnose a leak also logically correlates with Dr. Novak's stricken testimony at his evidence deposition on proximate cause. She further claims that Dr. Novak's testimony regarding the disastrous nature of gastric bypass surgery in the context of his standard of care opinions at his discovery deposition logically implies a causal connection between Dr. Vitello's postoperative failure to diagnose a leak and Tonette's death. We find these arguments unpersuasive.

¶ 23 The disclosure requirements of Rule 213 are mandatory and subject to strict compliance. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004). Rule 213(g) limits expert opinion testimony at trial to "[t]he information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition." Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007). The rule further provides: "Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon



objection at trial." *Id.*

¶ 24 Tasha's reliance on *Barton v. Chicago and North Western Transportation Co.*, 325 Ill. App. 3d 1005, 1039-41 (2001), in support of her logical corollary argument is misplaced. *Barton* supports the proposition that it is not an automatic violation of Rule 213 for an expert to elaborate on a previously disclosed opinion, provided such an elaboration states logical corollaries to the opinion, rather than new reasons for it. *Id.* at 1039. The expert's opinions on breach of duty in *Barton* were disclosed prior to trial in a report prepared by the expert, and the *Barton* court held that the testimony at trial was a logical corollary to opinions previously disclosed in that report. *Id.* at 1040-41.

¶ 25 Here, the only disclosed opinions related to the testimony of Dr. Novak were opinions on deviations from the standard of care. Even if we were to agree that something found in a medical journal article that was not written by Dr. Novak could be considered a logical corollary to his disclosed opinions, it could only have been an elaboration on his opinions on standard of care deviations. Plaintiff's Rule 213 disclosures relating to the testimony of Dr. Novak did not include any opinion on proximate cause; thus, nothing in the attached article could be considered an elaboration of such an opinion. Similarly, nothing in Dr. Novak's testimony regarding the disastrous nature of gastric bypass surgery could be considered an elaboration on his opinions on proximate cause, because no such opinions were disclosed. Therefore, the trial court did not abuse its discretion in sustaining Dr. Vitello's objections to Dr. Novak's testimony on the issue of proximate cause.

¶ 26 Tasha also claims that Dr. Vitello engaged in tactical gamesmanship and the trial court

did not consider Rule 213(k), which provides that the rule is to be liberally construed to do substantial justice between or among the parties. Ill. S. Ct. R. 213(k) (eff. Jan. 1, 2007). The comments for paragraph k explain that when ordering appropriate relief for a violation of the rule, a trial court should take into account that the rule is intended to be a shield to prevent unfair surprise but not a sword to prevent the admission of relevant evidence on the basis of a technicality. Ill. S. Ct. R. 213(k), Committee Comments (adopted March 28, 2002).

¶ 27 This argument is not well taken. Tasha correctly notes that one of the purposes of Rule 213 is to prevent unfair surprise at trial (see Ill. S. Ct. R. 213(f), Committee Comments (adopted March 28, 2002)). "To allow either side to ignore Rule 213's plain language defeats the purpose of the rule and encourages tactical gamesmanship." *Sullivan*, 209 Ill. 2d at 109-10. However, the failure of Dr. Vitello's counsel to question Dr. Novak about opinions that were not disclosed is not tactical gamesmanship, and is not the type of conduct the rule seeks to prevent. Rather, failing to disclose any opinions on proximate cause, a required element in a medical malpractice suit, but then eliciting such opinions in an evidence deposition and arguing that they are simply logical corollaries to disclosed standard of care deviation opinions is a clear example of the type of tactical gamesmanship the rule is designed to discourage.

¶ 28 Finally, Tasha argues that the extreme remedy of striking the testimony constituted an abuse of discretion by the trial court. We disagree. Because Rule 213 demands strict compliance, a court should not hesitate to sanction a party that does not comply with its provisions. *Sullivan*, 209 Ill. 2d at 110. In determining whether excluding testimony is a proper sanction for nondisclosure, a court must consider: (1) the surprise to the adverse party; (2) the

prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. *Id.*

¶ 29 Regarding the first factor, Tasha repeatedly argued in the trial court and again argues here that Dr. Vitello could not have been surprised by Dr. Novak's testimony on causation. Tasha contends that because Dr. Novak's Rule 213 disclosure stated that he believed that there was a reasonable and meritorious cause for filing the case and because Dr. Novak's causation opinions were a logical corollary to his disclosed opinions on standard of care, it is disingenuous for Dr. Vitello to claim that Dr. Novak's causation testimony was a surprise.

¶ 30 In fact, it is disingenuous to claim that general statements made by a medical expert on whether a plaintiff has a legal cause of action coupled with disclosed opinions regarding standard of care deviations could put an opposing party on notice regarding how plaintiff intends to show the causal connection between the alleged deviations and the injury. Disclosing that an expert intends to testify that it was a deviation from the standard of care not to order a CBC does not put the opposing party on notice that the expert also intends to testify that if a CBC had been ordered, the white blood cell count would have indicated the presence of infection and steps could have been taken to prevent the patient's death. Similarly, disclosing that an expert intends to testify that it was a deviation from the standard of care not to order an upper GI test does not put the opposing party on notice that the expert also intends to testify that if an upper GI test had been ordered, it would have disclosed a leak and procedures could have been performed that would have prevented the patient's death. As the trial court correctly explained, the purpose of Rule 213

is to ensure that the defendant knows before trial the specific opinions that he needs to have his own expert address at trial. There were no disclosures, either in the interrogatory answers or in Dr. Novak's discovery deposition, that Dr. Novak intended to testify at trial that the alleged deviations caused Tonette's death. Dr. Vitello was, therefore, surprised by Dr. Novak's causation testimony at the evidence deposition.

¶ 31 Regarding the second and third factors, the nature of the testimony and its prejudicial effect are equally clear. Expert opinion regarding the causal connection between the standard of care deviation and the patient's death is a required element of a medical malpractice case and no other witness offered causation testimony. Dr. Vitello was prejudiced because he was not adequately prepared to cross-examine Dr. Novak on his causation testimony and had not disclosed any experts of his own that would be able to rebut such testimony. Regarding the fourth through sixth factors, the record shows that Dr. Vitello was diligent in sending his Rule 213 interrogatories to Tasha; that Dr. Vitello timely objected to Dr. Novak's testimony; and that the failure to disclose any opinions on a required element of Tasha's case when Dr. Novak's standard of care deviation opinions were fully disclosed does not indicate good faith.

¶ 32 For all of these reasons, we conclude that the trial court did not abuse its discretion in barring Dr. Novak's causation testimony as a sanction for plaintiff's Rule 213 violation.

¶ 33 B. Directed Finding

¶ 34 Tasha next contends that the trial court erred in entering a directed finding in favor of Dr. Vitello on the grounds that she failed to present a *prima facie* case. At the close of Tasha's evidence, Dr. Vitello filed a motion for a directed finding pursuant to section 2-1110 of the Code

of Civil Procedure (735 ILCS 5/2-1110 (West 2012)).

¶ 35 In ruling on a section 2-1110 motion, a trial court must first determine whether the plaintiff has presented a *prima facie* case by presenting at least some evidence on every element essential to the cause of action. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). If the plaintiff fails to meet this burden, the trial court should grant the motion and enter judgment in favor of the defendant. *Id.* The trial court's determination of whether the plaintiff has failed to present a *prima facie* case is a matter of law; thus, our review is *de novo*. *Id.*

¶ 36 As previously noted, in order to sustain a cause of action for negligence, a plaintiff must establish a standard of care, a deviation from that standard, and a causal connection between the deviation and the injury. *Simmons*, 198 Ill. 2d at 556. In addition to the requirement that proximate cause be established to a reasonable degree of medical certainty, the causal connection must not be contingent, speculative, or merely possible. *Johnson v. Loyola University Medical Center*, 384 Ill. App. 3d 115, 121 (2008).

¶ 37 Tasha contends that Dr. Fusaro's testimony established that the proximate cause of Tonette's death was a postoperative leak that led to the peritonitis. She then argues that even without the stricken testimony from Dr. Novak that explicitly linked Dr. Vitello's failure to order certain diagnostic tests she claimed would have detected the leak to Tonette's death, there was at least some evidence of the linkage in Dr. Novak's remaining testimony, specifically his testimony that if an infection was present, a CBC would have shown an elevated white blood cell count and an upper GI test would have shown any leak that existed.

¶ 38 We note that Dr. Fusaro testified that he suspected there must have been a leak following

the surgery but acknowledged that he could not determine to a reasonable degree of medical certainty that the peritonitis was caused by a leak. However, even if we were to accept Dr. Fusaro's deduction that the peritonitis was, in fact, caused by a postoperative leak, Dr. Fusaro also testified that such a leak would have developed sometime within a four-day period following the surgery, but he could not say specifically when the leak developed. Because there was no expert testimony establishing when the leak occurred, it could have developed after Tonette's discharge. Therefore, any testimony from Dr. Novak regarding what certain diagnostic tests might have shown could not establish, even remotely, evidence of a causal connection between Dr. Vitello's failure to order such tests and Tonette's death. This is especially true in light of Dr. Novak's testimony that death, infections and leaks are known risks of gastric bypass surgery even in the absence of negligence on the part of the surgeon.

¶ 39 Tasha further points to Dr. Novak's testimony that if a postoperative leak had been detected, it could have been repaired by another operation or by inserting a drain until the leak healed as some evidence of a causal connection. This is, however, mere speculation and is insufficient to establish proximate cause on the facts of this case.

¶ 40 Finally, Tasha argues that she established proximate cause under the "lost chance" doctrine adopted by the Illinois Supreme Court in *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 119 (1997). Under the lost chance doctrine, proximate cause may be established by evidence, to a reasonable degree of medical certainty, that the alleged negligence lessened the effectiveness of treatment or increased the risk of harm to the plaintiff. *Id.* at 104-05, 119.

¶ 41 We agree with Dr. Vitello that this argument has been waived. Tasha did not invoke the

last chance doctrine in the trial court and does so for the first time on appeal. It is well settled that an issue not presented to or raised before the trial court cannot be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). However, even if this issue had not been waived, Dr. Novak did not testify to a reasonable degree of medical certainty that the failure to order certain diagnostic tests delayed the diagnosis of a postoperative leak or that the delayed diagnosis lessened the effectiveness of treatment or increased the risk of harm.

¶ 42 Therefore, we conclude that the trial court correctly granted Dr. Vitello's section 2-1110 motion for a directed finding and entered judgment for Dr. Vitello on the grounds that Tasha failed to present a *prima facie* case. For the reasons stated herein, the judgment of the circuit court is affirmed.

¶ 43 Affirmed.